

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j) of the)
Communications Act -- Competitive Bidding)
for Commercial Broadcast and Instructional)
Television Fixed Service Licenses)

MM Docket No. 97-234

GC Docket No. 92-52

GEN Docket No. 90-264

Reexamination of the Policy Statement on)
Comparative Broadcast Hearings)

Proposals to Reform the Commission's)
Comparative Hearing Process to Expedite the)
Resolution of Cases)

To: The Commission

COMMENTS OF MARRI BROADCASTING, L.P.

Marri Broadcasting, L.P. ("Marri"), by its attorneys, hereby submits comments in response to the Commission's Notice of Proposed Rulemaking in the above-referenced proceeding.^{1/} Marri urges the Commission to waive its rules for applications subject to Section 309(l) of the Communications Act, and to allow those applicants to assign their bidding rights to third parties (*i.e.*, white knights) following the closing of the 180-day settlement window provided for by the Balanced Budget Act of 1997, P.L. No. 105-33, 11 Stat. 251 (1997) (the "1997 Act"). For those Section 309(l) licenses which are auctioned, the Commission should

^{1/} Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, Notice of Proposed Rulemaking, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, (rel. Nov. 26, 1997) ("Notice").

reimburse the legitimate and prudent expenses of losing bidders and those applicants who choose not to participate in the auction. Alternatively, Marri urges the Commission to waive its rules following the settlement window and approve settlement agreements involving third-party applicants or settlement payments beyond an applicant's legitimate and prudent expenses. *See* 47 C.F.R. § 73.3525(a)(3). Each of these proposals would promote fairness, conserve administrative resources and facilitate the rapid provision of new broadcast service, and would therefore benefit the public interest.

I. The Commission Should Allow Section 309(l) Applicants to Assign Their Bidding Rights to Third Parties or Reimburse The Legitimate And Prudent Expenses Of Non-Winning Bidders And Parties Choosing Not To Participate In Auctions.

Marri strongly urges the Commission to allow mutually-exclusive applicants for new broadcast licenses to assign their bidding rights to third parties prior to auction of those licenses. Implementing such a policy will provide substantial equitable relief and real financial relief to the parties involved, who never envisioned that the licenses they sought would be auctioned. Additionally, allowing parties to assign their bidding rights will increase the value of the licenses auctioned and thereby benefit the public interest.

In passing the 1997 Act, Congress implemented whole-scale and permanent changes to the manner in which the Commission issues initial broadcast station licenses. Parties filing applications for new station licenses since the passage of the 1997 Act have had ample time to "develop business plans, assess market conditions, and evaluate the availability of equipment" with an eye toward a rapid auction of that license. 47 U.S.C. § 309(j)(3)(E) (added in the 1997 Act). As the Commission recognized in the *Notice*, however, parties like Marri necessarily have not been afforded this planning luxury, nor did they file their new station applications with the expectation of eventually participating in an auction. *Notice* at ¶ 15.

Marri has filed and is actively prosecuting applications for new television station licenses in markets nationwide. Each of Marri's applications was filed well before July 1, 1997, and a majority are subject to new Section 309(l) of the Communications Act, in that they are mutually

exclusive with at least one other application filed prior to July 1, 1997. Of course, due to the lack of judicially-sustainable comparative hearing criteria no progress in resolving the conflicts had been made on any of Marri's applications until the passage of the 1997 Act.

In response to the terms of the 1997 Act, Marri is now aggressively attempting to resolve its various application conflicts through settlement agreements. Nevertheless, despite its considerable efforts, Marri will not be able to settle all of its application conflicts by the close of the congressionally-mandated window on February 1, 1998. After February 1, 1998, Marri will have only limited options. Marri may possibly be able to negotiate a settlement for its expenses with applicants it believes may provide inferior service to the viewing public. Or, Marri can compete at auction with applicants who may be considerably better capitalized. Neither scenario is equitable to Marri, especially if it cannot settle and is not victorious at auction. In retrospect, therefore, Marri accedes that it may not have undertaken the time and expense of prosecuting these applications had auction been the inevitable result.

Permitting the finite class of Section 309(l) applicants to assign their bidding rights will provide real relief to these applicants. First, applicants (such as Marri) will have the opportunity -- but no guarantee -- to fully recoup their financial investment and commitment to obtaining the new station license. Second, the applicant's considerable risk of having diligently prosecuted an application this far only to lose at an auction it never anticipated will be mitigated. The possibility of losing at auction then will be assumed by a financially secure party that is acutely aware of the risk being undertaken.^{2/}

The obvious benefit of this policy to private parties (albeit a tightly restricted class) would be more than offset by the broader public interest benefit of enriching the public treasury. In establishing auctions as the primary method of awarding new broadcast station licenses, Congress clearly recognized the benefit of selling the valuable broadcast spectrum. Permitting

^{2/} An applicant's permission to assign its bidding rights would cease on the date that short-form applications indicating a desire to participate in the auction are due.

applicants to assign their bidding rights to third parties would maximize this benefit. The value of the license being assigned would no longer be dependent upon the finances of applicants originally capitalized for a comparative process. Instead, the price of the licenses would be pushed toward their true market value by well-capitalized entities with the resources to institute new service rapidly to the general public.

In short, Marri's proposed policy would equitably redress the situation of a unique and finite class of private applicants. As such, permitting the assignment of bidding rights would not compromise the Commission's long-standing policies or encourage abusive or frivolous behavior in the future. Moreover, the policy would provide substantial public benefits in increased payments to the Treasury and expedited service to the general public.

Marri also believes that equitable principles and the public interest would be served by offering reimbursements of the legitimate and prudent application expenses to parties who filed prior to July 1, 1997. Marri therefore recommends that the Commission directly reimburse two groups of applicants: those who, possibly because they lack the funds to win, although they possess the funds needed to operate the license sought, choose not to participate in the auction; and those who, possibly by virtue of the time and effort expended already, feel compelled to bid, but are not successful.

Adopting such a reimbursement plan would thus benefit the public interest while imposing little burden on the Commission. The Commission already has proposed to reimburse non-bidders and losing bidders for their filing fees once grant of the auctioned license is final and the license is paid for in full. *Notice* at ¶ 16. The Commission undertakes similar actions in other services, where it will reimburse up-front payments and deposits to losing or withdrawn bidders. *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding*, 6 Comm. Reg. 362 (1997); *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 4 Comm. Reg. 746 (1996). Reimbursing the legitimate and prudent expenses incurred by Marri and others in prosecuting their applications is not distinguishable from these other reimbursements.

The reimbursement plan also would be simple to administer. Upon final grant of a license and full payment by the winning bidder, parties eligible for reimbursement would submit the necessary paperwork required under *Re-Evaluation of Standards for Professionals Seeking Reimbursement Pursuant to Rule 73.3525*, 88 F.C.C.2d 1047 (1982) and other pertinent Commission precedent. The Commission then would reimburse each party's approved amounts from the proceeds of the auction. Alternatively, the Commission could propose reimbursement by the winning bidder and factor the reimbursements into the final license price. Nor need there be any concern about possible abuses of the reimbursement process. The Commission has had extensive experience in policing reimbursement claims in other contexts, *e.g.*, in connection with settlements among mutually-exclusive applicants (*see* Section 73.3525 (a) of the Rules) and applications for assignment of construction permits for unbuilt stations (*see* Section 73.3597(c)(2)). The detailed documentation requirements applicable to those cases could easily be applied in an auction setting.

II. The Commission Should Waive the Provisions of Section 73.3525(a)(3) and Should Permit Third-Party Settlements During the Post-Settlement Window Period for Section 309(l) Applicants.

If the Commission chooses not to allow parties to assign their bidding rights, it should at least waive its restrictions on unlimited settlement payments, 47 C.F.R. § 73.3525(a)(3), and its prohibition against third party settlements following the close of congressionally-mandated settlement window on February 1, 1998. The 1997 Act mandates that until February 1, 1998, for applications on file prior to July 1, 1997, the Commission must "waive any provision of its regulations necessary to permit [applicants] to enter into an agreement to procure the removal of a conflict between their applications." *Notice* at ¶ 7. Pursuant to this mandate, the Commission already has waived the restrictions of Section 73.3525(a)(3) and its third-party settlement prohibition, thereby allowing parties to more easily and equitably settle application conflicts, as long as the settlement agreements comply with Section 311(c) of the Communications Act.³⁷ *See*

³⁷ In order to approve a settlement agreement under Section 311(c), the Commission must find that the agreement is consistent with the public interest, convenience, and necessity, and that none of the parties filed its application for the purpose of reaching or carrying out such an agreement. 47 U.S.C. § 311(c) (1997).

Notice at ¶ 25; *Gonzales Broadcasting, Inc.*, 12 FCC Rcd 12253, 12255-56 (1997) (waiving Section 73.3525(a)(3)); *Notice*, at ¶ 26; *Edward P. and Pamela J. Levine*, FCC 97I-41 (rel. Dec. 29, 1997) (waiving the white knight prohibition).

Marri entirely agrees with the Commission, *see Notice* at ¶ 27, that settlements should be permitted following the close of the settlement window. Unlike the Commission, however, Marri strongly believes that the public interest would be served by extending the waivers of the white knight and unlimited payment rules, which will further encourage parties to settle, thereby avoiding the delay and expense of holding an auction, which, in turn will hasten new service to the general public.

There is nothing in the 1997 Act or the Commission's rules which would impede continued waiver of the restrictions. Additionally, waiving these rules during the post-settlement window would break no new ground. Aside from the current waiver of both the payment limitation and the white knight restriction, the Commission allowed unlimited settlement payments in all cases prior to 1990. *Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990), *recon. granted in part*, 6 FCC Rcd 2901 (1991). The Commission also waived the policy for a 90-day period in 1995, to facilitate settlements of many of the cases frozen by the lack of comparative hearing criteria. *Public Notice*, 10 FCC Rcd 12182 (1995).

Nor would waiving the rules undermine the Commission's initial motivation for the restrictions. Both the unlimited settlement prohibition and the white knight prohibition stem from the Commission's concern that permitting such settlements would create "an economic incentive for the filing of sham applications in future cases." *Rebecca Radio of Marco*, 5 FCC Rcd 937, *recon. denied*, 5 FCC Rcd 2913 (1990). These concerns are largely inapplicable here for two reasons. First, all applicants filing, such as Marri, for new licenses since the prohibitions were installed did so in awareness of those restrictions. Indeed, it is only because of the extraordinary wholesale changes in governing law that these application conflicts will not be resolved through the comparative hearing process. The Commission therefore may assume that

the conduct it sought to discourage has been so discouraged. *See Public Notice*, 10 FCC Rcd at 12182; *James U. Steele*, 4 FCC Rcd 4700, 4703 (1989), *partially vacated*, 5 FCC Rcd 4121 (1990).

Second, because the waivers would apply to a finite class of cases -- those mutually exclusive applications filed before July 1, 1997 -- for a finite period, and there will be virtually no threat of future frivolous applications. Moreover, the Commission is now required to resolve new conflicting applications through an auction. Any party filing an application for a new station will know that there is no possibility of lengthy and protracted comparative hearings, and therefore no encouragement for a quick settlement.

Other public interest factors urge allowing continued waivers. Expeditious resolution of mutually exclusive applications in order to facilitate the offering of new service to the general public is one of the Commission's primary concerns. *Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd at 88. Permitting white knight settlements and unlimited payment settlements will serve the public interest by addressing this issue and hastening the onset of new service to the public. With these waivers, more application conflicts will be removed quickly, thereby avoiding the additional delay (and expense) of arranging and holding an auction.^{4/}

The need for waivers of the rules is especially pointed where the primary impediment to a settlement is the inability of any one party to reimburse all of its competitors. *See Rebecca Radio*, 5 FCC Rcd at 598. By allowing unlimited settlements and non-party settlements, there is accordingly a greater chance that the spectrum and license will be awarded to a party that has the resources, as well as the desire, to bring quality service rapidly to the public. *See Notice* at ¶ 18.

Permitting these settlements also will conserve the resources of the parties and the Commission. The parties will not need to file additional applications (even short forms), make

^{4/} Of course, the Commission has not devised those auction rules, and prompt implementation of the rules when promulgated could be delayed by reconsideration or appeal, further delaying new service.

any deposits or up-front payments, or continue to monitor these already lengthy proceedings. And, because the Mass Media Bureau has extensive experience reviewing settlement agreements but little experience in holding auctions, it appears that agency resources, at least initially, will be conserved by resolving conflicts through settlements while the Mass Media Bureau develops and masters the auction process.

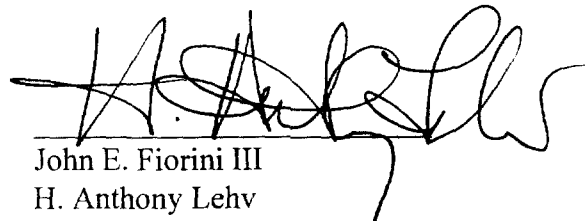
CONCLUSION

Marri, like many other potential licensees, filed applications believing that the Commission ultimately would award licenses based upon comparative criteria. Due to entirely unforeseen changes in the Communications Act, this no longer is possible. Faced with these changes, Marri should be permitted to assign its bidding rights to a third party who may be able to bid full-market value for the license. Additionally, if an original applicant chooses not to participate at auction or is a losing bidder, the Commission, at minimum, should reimburse that party's legitimate and prudent expenses. Alternatively, the Commission should continue to encourage settlements after the settlement window closes on February 1, 1998, by continuing to waive its unlimited payment and third-party settlement restrictions.

Respectfully submitted,

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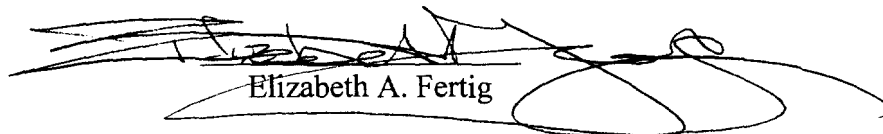
CERTIFICATE OF SERVICE

I, Elizabeth A. Fertig, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 26th day of January, 1998, caused to be sent by hand delivery, a copy of the foregoing Comments of Marri Broadcasting, L.P. to the following:

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